Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	))	CG Docket No. 02-278

OPPOSITION OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES TO PETITIONS FOR RECONSIDERATION

Pursuant to 47 C.F.R. § 1.425(f), the National Association of State Utility Consumer Advocates ("NASUCA")[1] submits this Opposition to several petitions for reconsideration of the *Report and Order* adopted by the Federal Communications Commission ("Commission") in this proceeding on June 26, 2003.[2] The *Report and Order* adopted a national do-not-call registry by which consumers may avoid unwanted telemarketing calls[3] and made other revisions to the Commission's telemarketing rules.

A total of 55 petitions for reconsideration of the *Report and Order* were filed.[4] The vast majority of those petitions addressed the Commission's elimination of the "established business relationship" exemption to the rules governing the sending of unsolicited fax advertisements.[5] Because those petitions primarily concern the

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[1] NASUCA is an association of 43 consumer advocates in 41 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

[2] 18 FCC Rcd 14014 (2003).

[3] See *id*., ¶ 28.

[4] See Public Notice, Report No. 2627, issued September 8, 2003.

[5] See *Report and Order*, ¶ 189.

application of the revised rule to faxes sent to businesses or other organizations, NASUCA will not respond to those petitions beyond urging the Commission to make no changes to the revised rule as it applies to residential consumers. Residential consumers should not be burdened by the costs and inconvenience caused by unsolicited fax advertising,[6] even from entities with which they have an established business relationship. Instead, such entities should be required to obtain residential consumers' express permission before sending them fax advertising.[7]

NASUCA's Opposition will focus on several petitions for reconsideration that address other issues.[8] Among other things, the Direct Marketing Association ("DMA") asks the Commission to preempt "unequivocally" state do-not-call laws as applied to interstate calls and to reconsider the caller identification requirements adopted in the *Report and Order*.[9] Three petitioners have argued for special treatment for their particular businesses or industries.[10] The DMA and DialAmerica Marketing, Inc. ("DialAmerica") each seek clarification of the Commission's determination that a message must not be "predominantly commercial in nature" in order to qualify for the exemption for charitable organizations contained in the rules.[11]

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[6] See *id*.

[7] See *id*., ¶ 191.

[8] The failure of NASUCA to address any issue contained in any petition for reconsideration should not be construed as demonstrating NASUCA's agreement with the petitioner's position.

[9] DMA Petition for Reconsideration, filed August 25, 2003, at 2-8, 20-21.

[10] Petition for Reconsideration of the State and Regional Newspaper Associations ("Newspaper Associations"), filed August 25, 2003; National Association of Realtors Petition for Reconsideration of Telemarketing and Facsimile Advertisement Rules ("Realtors"), filed August 25, 2003; Petition for Reconsideration Submitted by Trader Publishing Company ("Trader"), filed August 25, 2003. Trader is a publisher of classified advertising magazines in which, among other things, consumers and businesses may "advertise their interest in buying or selling a particular product…." Trader at 2.

[11] DMA at 21; Petition for Reconsideration filed by DialAmerica on August 25, 2003.

As discussed below, these petitions lack merit. Thus, NASUCA urges the Commission to deny the petitions.

I. THE COMMISSION SHOULD NOT PREEMPT STATE DO-NOT-CALL LAWS FOR INTERSTATE CALLS.

The DMA asks the Commission to preempt state do-not-call laws with respect to interstate calls. For support, the DMA points to the fact that some states' laws contain definitions that are inconsistent with the Commission's rules, and alleges that some states are unwilling to forgo their own databases or are unwilling to share information with the national database.[12]

The Commission should deny the DMA's request for two reasons. First, the DMA's request is premature. In adopting rules implementing the national do-not-call registry, the Federal Trade Commission ("FTC") recognized that the harmonization of federal and state do-not-call laws would take time – as long as three years.[13] The FTC has decided to refrain from preempting state laws until it can assess the success of its efforts to work with the states.[14] It has been less than ten months since the harmonization process began. The DMA's impatience with the progress is no reason for the Commission to abort the effort of the federal government and the states to resolve this issue.

Second, Congress did not intend for a single national do-not-call database to replace state databases, nor did it impose any obligation on the states to share their

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[12] DMA at 2-8.

[13] See FTC Comments, CG Docket No. 02-278, filed May 12, 2003, at 17.

[14] Federal Trade Commission, Telemarketing Sales Rule, Final Amended Rule, 68 Fed. Reg. 4580, 4638 (January 29, 2003).

information with the federal database. Rather, 47 U.S.C. § 227(c)(2) recognizes the continued use of state databases, and only obligates states to ensure that numbers from their states found in the federal database are also included in their databases:

> If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such state.

The DMA's position is baseless.

Preemption of state laws as they apply to interstate calls is unwarranted at this time. The Commission should deny the DMA's petition.

II. AN EXEMPTION FOR NEWS PUBLICATIONS IS UNWARRANTED AND BEYOND THE COMMISSION'S STATUTORY AUTHORITY.

As members of their industry did in comments in this proceeding,[15] the Newspaper Associations urge the Commission to exempt newspapers, magazines and similar publications from all of the Commission's telemarketing rules, including the do-not-call provisions.[16] The Newspaper Associations argue that the Commission should consider "the adverse impact of its rules on the circulation of newspapers," and thus the newspapers' First Amendment rights.[17] The Newspaper Associations assert that the *Central Hudson* test,[18] relied on by the Commission in examining the constitutionality of its telemarketing rules,[19] is inappropriate for examination of the effect the rules may have

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[15] See Comments of the Newspaper Association of America, filed December 9, 2002, at 12-14; Comments of the Magazine Publishers of America, filed December 9, 2002, at 13-14.

[16] Newspaper Associations at 12.

[17] *Id*. at 6.

[18] *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

[19] *Report and Order*, ¶¶ 63-74.

on the newspapers' First Amendment rights.[20] For support, the Newspapers Associations rely on several cases, mostly from state courts.[21]

The Newspaper Associations overstate the relevance of these cases and understate the importance of *Central Hudson* to the facts and circumstances at hand. The U.S. Supreme Court has consistently relied on the use of the *Central Hudson* test in determining the constitutionality of laws affecting the distribution of newspapers.[22] Most recently, in *City of Cincinnati v. Discovery Network, Inc.*,[23] relied upon by the Newspaper Associations in its argument concerning the distinction between commercial and noncommercial speech,[24] the Court explicitly based its decision on *Central Hudson* and *Board of Trustees of State University of N.Y. v. Fox*[25]: "Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox*, we need not decide whether that policy should be subjected to more exacting review."[26] Thus, the *Central Hudson* test is appropriate for determining the constitutionality of the Commission's telemarketing rules.

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[20] Newspaper Associations at 10.

[21] *Id*. at 9-10.

[22] The Newspaper Associations state that in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Supreme Court did not "even suggest that the *Central Hudson* test or commercial speech doctrine could provide an appropriate framework for assessing the constitutionality of regulations that impeded circulation." Newspaper Associations at 9. In *Lakewood*, however, the Court addressed a licensing process which gave the mayor "unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable'…." 486 U.S. at 772. The Commission's regulations here neither involve licensing nor provide the Commission with such broad discretion. Thus, *Lakewood* does not apply to the rule at issue in the instant proceeding.

[23] 507 U.S. 410 (1993).

[24] Newspaper Associations at 9.

[25] 492 U.S. 469 (1989) (manner of restriction on speech need not be absolutely the least severe that will achieve the end desired by the government, but must be a reasonable fit between the legislature's intent and the means chosen to accomplish that intent).

[26] 507 U.S. at 416, n. 11.

The *Discovery Network* Court also emphasized that its decision did not constitute an absolute bar on distinctions between commercial and noncommercial speech:

> Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing.[27]

Thus, the Commission is not precluded from prohibiting newspapers from telemarketing to numbers that are included on the do-not-call registry.[28]

The Newspaper Associations also assert that the Commission should carve an exemption from its do-not-call rules for newspapers and other publications based on the fact that such publications have been exempt from some states' do-not-call laws.[29] The Newspaper Associations claim that these exemptions were crafted because of "[t]he particularly local nature of newspapers and the special relationship they have with their communities…."[30]

This argument is disingenuous and without merit. First, newspapers are exempt from do-not-call laws apparently in only six of the 36 states that have such laws.[31] The

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[27] *Id*. at 428.

[28] Although the U.S. District Court for Colorado has determined that the exemption for nonprofit entities in the FTC's do-not-call rules violates the First Amendment rights of commercial telemarketers, *Mainstream Marketing v. FTC*, Civil Action No. 03-N-0184, slip op. (D. Colo. September 25, 2003), the U.S. Court of Appeals for the Tenth Circuit has stayed that decision pending appeal. *FTC v. Mainstream Marketing*, Case No. 03-1429, slip op. (10th Cir. October 7, 2003). The Tenth Circuit also has refused to enjoin the Commission from enforcing its telemarketing rules, including the do-not-call provisions, citing "the public interest in respecting 'residential privacy,'" "the strong expectation interest of the many millions of Americans who have registered," and failure of the telemarketing interests to establish the likelihood that they would succeed on the merits. *Mainstream Marketing v. FCC*, No. 03-9571, slip op. at 3 (10th Cir. September 26, 2003).

[29] Newspaper Associations at 10-11.

[30] *Id*. at 10.

[31] Ala. Code § 8-19(C); Ark. Code Ann. § 4-99-401; Fla. Stat. Ann. § 501.059; Ind. Code Ann. § 24.4.7; Miss. Code § 77-3-609; Okla. Stat. tit. 15 § 775B.1.

Newspaper Associations are asking the Commission to grant them an exemption that they have been unable to obtain in at least 30 states. Thus, the Newspaper Associations are attempting to parlay their lobbying successes in the six states into a nationwide exemption. The Commission should not do so.

Second, the newspaper exemptions are less a recognition of newspapers' special relationship with their communities and more a product of the newspapers' lobbying efforts in a few states. In four of the six states, the newspaper exemption is one of many do-not-call exemptions crafted by state legislatures: Alabama has 25 exemptions to its state do-not-call law; Oklahoma has 20; Mississippi has ten; and Arkansas has eight. Other special interest groups that have been granted exemptions from these states' do-not-call laws include securities brokers, insurance companies, book and video clubs, certain food sellers and funeral homes. Obviously, in these states, exemptions from do-not-call laws have little correlation with the relationship an industry may have with its community. The Newspaper Associations' assertions ring hollow.

Indeed, the Commission lacks the authority to create exemptions that are not included in the statute. Congress has specifically enumerated the types of calls that are exempt from the Commission's telemarketing rules (i.e., calls to a person with that person's prior express invitation or approval, calls to a person with whom the caller has an established business relationship and calls by a tax exempt organization) by removing them from the definition of "telephone solicitation."[32] Moreover, Congress has granted the Commission specific authority to consider exempting certain other types of calls only from the statutory prohibition on making calls using artificial or prerecorded messages

[32] 47 U.S.C. § 227(a)(3).

contained in Section 227(b)(1)(B).[33] If Congress had intended that the Commission could create additional exemptions from the do-not-call rules, it would have given the Commission specific authority to do so.

Nothing in the statute grants the Commission the authority to consider any other exemptions from the telemarketing rules. Thus, the Commission does not have statutory authority to grant the Newspaper Associations the relief they seek.

III. THE COMMISSION'S TELEMARKETING RULES SHOULD APPLY TO BUSINESSES CALLING RESIDENTIAL CONSUMERS WHO ARE SELLING PROPERTY.

Both the Realtors and Trader urge the Commission to refrain from applying its telemarketing rules to calls made by businesses to residential consumers who are selling real estate or personal property. The Realtors assert that residential consumers who choose not to use a realtor to sell their homes "are acting as a parties [sic] to a business transaction" and thus should not be accorded the protections contained in the telemarketing rules.[34] In addition, both the Realtors and Trader assert that by advertising the sale of real estate or personal property, a residential consumer should expect to receive calls receive regarding the sale of the property, even if the caller's interest is not in buying the property, but in urging the consumer to sell the property by another means.[35] They argue that such calls are not the type of unwanted or unexpected calls that the telemarketing rules are designed to prevent.[36]

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[33] 47 U.S.C. § 227(b)(2)(B).

[34] Realtors at 16-17.

[35] Realtors at 17-18; Trader at 3.

[36] Realtors at 17-18; Trader at 3.

Both parties present strained interpretations of the rules and the statute. The do-not-call rules apply specifically to residential telephone customers,[37] i.e., customers whose telephone use is primarily for personal reasons. Residential customers do not lose that status simply because they may occasionally conduct a "business transaction" over their home telephone. Such residential customers still should be accorded all the protection from intrusive telemarketing calls that the Commission's rules provide.

In addition, when consumers advertise to sell their own real or personal property, they expect to receive calls from prospective buyers of the property. They do not expect to receive calls from companies urging them to spend more money for additional advertising or agent commissions in order to sell the property. Similarly, consumers who advertise for other personal reasons (to buy property, to seek employment, to hire someone for personal services, to seek housing or a roommate, etc.) do not expect the ad to produce sales calls from other advertising sources. Such consumers have not waived their do-not-call protection. Telephone calls soliciting individuals to use the services provided by the Realtors and Trader fall squarely within the purpose of the telemarketing rules – to reduce annoying and intrusive telemarketing calls. The Commission should reject the clarification sought by the Realtors and Trader.

IV. THE COMMISSION IS CORRECT IN REFUSING TO EXEMPT TELEMARKETING CALLS THAT ARE PREDOMINANTLY COMMERCIAL IN NATURE.

The Commission has determined that a call that is "predominantly commercial in nature" does not qualify for the nonprofit exemption from the telemarketing rules.[38]

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[37] See 47 C.F.R. § 64.1200(c)(2).

[38] *Report and Order*, ¶ 128.

Thus, telemarketing calls are not exempt if the message contains only some noncommercial matter or if the seller donates only a portion of its proceeds to charity.[39]

The DMA and DialAmerica urge the Commission to reconsider its decision. The DMA asserts that the Commission's determination lacks a statutory or policy basis.[40] DialAmerica suggests that programs meeting its criteria should be exempted from the do-not-call rules.[41] Neither argument is persuasive.

The DMA's argument is erroneous. The Commission's rules, in fact, have already exceeded the statutory requirements for the inclusion of entities under the nonprofit exemption. The statutory definition of "telephone solicitation" exempts telemarketing calls made "*by* a tax exempt nonprofit organization."[42] Thus, Congress clearly intended that the exemption be applied narrowly, i.e., only to those telemarketing calls actually made by nonprofit organizations. In 1995, the Commission by rule extended the exemption to calls made by agents of nonprofit organizations.[43] Because Congress envisioned a narrow application of the exemption, the Commission should also construe the exemption narrowly. Denying the exemption to calls that are "predominantly commercial" is consistent with a narrow application of the exemption.

In addition, the criteria set forth by DialAmerica are inconsistent with this narrow application of the exemption. Implicit in the intent of Congress and the Commission is

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[39] *Id.*

[40] DMA at 21.

[41] DialAmerica at 1. DialAmerica's criteria include: a donation of over 10% of the proceeds to the nonprofit corporation; full disclosure to consumers of the percentage donated to the nonprofit; the value of the product being sold is not over $100 and is at a competitive retail price; credit card information is not obtained at the time of sale; and the offering of a 100% refund and cancellation policy.

[42] 47 U.S.C. § 227(a)(3)(C) (emphasis added).

[43] See *Report and Order*, ¶ 125.

that the contribution made by the consumer should primarily benefit the nonprofit organization on whose behalf the call is made. A transaction in which the telemarketer receives up to 90% of the proceeds is not primarily for the benefit of the nonprofit organization receiving the contribution.

Neither the DMA nor DialAmerica provide sufficient reasons to alter the qualifications for the nonprofit exemption. The Commission thus should deny reconsideration on this issue.

V. CONCLUSION

The Commission's revised telemarketing rules provide consumers with greater control to reduce the intrusions caused by unwanted telemarketing calls. The petitions for reconsideration discussed above would lessen this benefit to consumers. The Commission should maintain the effectiveness of its telemarketing rules by denying these petitions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of the National Association of State Utility Consumer Advocates to Petitions for Reconsideration was served by first-class mail, postage prepaid, to the parties identified below on this 14th day of October 2003.

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